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Banking Law

SCOTT L. BAENA*

The author surveys recent Florida and federal responses, both legislative and judicial, to current forces and trends in the banking industry, including the soaring cost of money and its conflict with state usury laws and regulation Q, the increasing pressure for geographic expansion through merger and branching, the growing impact of international banking and foreign investment on the domestic banking community, and the emerging role of Florida as a money center.

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I. INTRODUCTION

Florida bankers and lawmakers alike were preoccupied with soaring interest rates during calendar year 1979. When the cost of

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money exceeded the maximum rates chargeable to borrowers under state usury laws, the Florida Legislature alleviated the situation, at least temporarily, by increasing interest rate ceilings.¹ In addition, Congress provided some relief by imposing a moratorium on usury laws pertaining to residential mortgage loans.² The point, however, that arbitrary usury ceilings impede lenders' reactions to growth in the money and credit markets has been dramatically driven home. State legislatures may eventually recognize that they cannot control the cost of money with usury laws, for the effect of such laws is to dry up credit altogether. Interest rate ceilings thus victimize the same necessitous borrower they supposedly protect.³

The response of the Florida Legislature to the present credit crisis reveals the ineffectiveness of usury laws. By setting usury ceilings, the state is in effect trying to outdistance prime rates and the Federal Reserve discount rate. Although it appears that money and credit markets will stabilize, this stabilization may once again be only temporary and a prelude to a new game of leap frog. The shortcomings of the present usury laws suggest that the legislature should soon consider repealing these statutes, or at least tying usury rates to the Federal Reserve discount rate.

On the other side of the coin, the movement to lift the ceilings on interest paid on deposits gained momentum during 1979.⁴ Ironically, depository institutions are also plagued by the rising cost of money. It is their preference, of course, to lend funds generated by deposits rather than borrow substantially more expensive federal funds. Over the past twenty years, however, these institutions have

1. 1979 Fla. Laws chs. 79-138, -274, -592; see notes 17-36 and accompanying text *infra*.

2. Consumer Services and Usury Act, Pub. L. No. 96-161, § 105(a)(1)(A), 93 Stat. 1233 (1979); see notes 45-47 and accompanying text *infra*.

3. Miami News, Jan. 9, 1979, at 9A, col. 5. University of Florida economics professors Robert Lanzillotti and Arnold Haggstad, appearing before the House Commerce Committee on January 8, 1979, told the Committee that ceilings on loan interest rates harm the consumers they are supposed to help, ultimately drying up credit by restricting profits of lenders. Tight credit harms low-income high-risk borrowers who are the first to be turned down by lending institutions, said the economists, who "called for all usury laws to be junked." Committee members argued that the removal of interest rate ceilings would lead to the exorbitant interest rates associated with loan sharks, as one legislator remarked that the professors had "been to college too long." *Id.*

4. See [Current] FED. BANKING L. REP. (CCH), Report Letter No. 789, at 2 (Nov. 15, 1979).

In a class action on behalf of senior citizens, various federal banking agencies were requested to index savings deposit interest rates to the rate of inflation. In the alternative, the class requested that notice be published in banking institutions warning that "savings accounts may be hazardous to your wealth." See [1978-1979 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 97,692.

suffered a severe deposit outflow, because money market rates have generally exceeded controlled interest rates,⁵ enabling depositors to earn more elsewhere.

Those in favor of removing deposit interest rate ceilings argue that such controls lead to disintermediation,⁶ particularly with respect to smaller institutions. In addition, ceilings result in a misallocation of financial resources, subsidize borrowers at the expense of savers, and retard competition by protecting marginal, inefficient competitors.⁷ Opponents of these efforts, on the other hand, contend that the abrogation of interest rate controls will adversely affect smaller, less profitable institutions which lack the means of earning the extra funds to pay the higher interest required to compete for depositors.⁸ Under the present system, however, the smaller institutions face an even graver crisis in the prospect of almost complete diminution of their deposit base. Bankers and depositors alike may reasonably view the 1979 amendments to regulation Q⁹ as merely transitory and may look forward to more permanent relief from interest rate controls in the near future.¹⁰

Efforts to adopt statewide branch banking in Florida continued in 1979. The bank holding companies, however, were unable to present a united front, leaving legislators to deal with numerous alternative plans.¹¹ As a result, the legislature enacted something less than full statewide branching, providing that under certain circumstances, branches may be established by merger with any other bank located in the state.¹²

5. Address by William M. Isaac, Director of the Federal Deposit Insurance Corporation, 52d Annual Mid-Winter Meeting of the New York State Bankers Association, New York City (Jan. 24, 1980) (on file *University of Miami Law Review*).

6. "Disintermediation refers to situations in which money that normally flows into banks and other financial intermediaries flows directly to the users of the funds." H. CROSSE & G. HERNPEL, *MANAGEMENT POLICIES FOR COMMERCIAL BANKS*, 113 (2d ed. 1973).

7. Address by William M. Isaac, *supra* note 5.

8. Miami News, Sept. 25, 1979, at 8A, col. 2. Senator Alan Cranston (D-Cal.), who led the opposition to phasing out interest rate ceilings in the Senate Banking Committee, argued that the proposal to increase interest rates every year for 10 years would drive many savings and loan institutions out of business, rather than solve the problems of the small saver.

9. 12 C.F.R. §§ 217.0-.7 (1979).

10. See SENATE COMM. ON BANKING, HOUSING AND URBAN AFFAIRS, *DEPOSITORY INSTITUTIONS DEREGULATION ACT*, S. REP. NO. 368, 96th Cong., 1st Sess. (1979) [hereinafter cited as SENATE REPORT]. The report recommends that ceilings or maximum rates of interest on deposits classified under regulation Q be increased by at least one-half of one percent each year commencing January 1, 1982 and continuing until 1989, when all regulation Q authority would expire. See notes 101-118 and accompanying text *infra*.

11. Miami News, May 21, 1979, at 10A, col. 2.

12. 1979 Fla. Laws ch. 79-590, § 1 (amending FLA. STAT. § 659.06 (1979)); see notes 66-

More interesting were the efforts to gain legislative approval of mergers between state bank holding companies and banks in seven other southern states. Such interstate mergers would supposedly enable local institutions to compete more effectively, through larger loans and expanded services, with banks entering the state from the principal money centers.¹³ Although proposed too late for enactment in 1979, the bill indicates that Florida may finally be ready to participate in an industrywide movement to remove geographic restraints on banking. Given the pressure to become a money center and to associate with other money centers, forces within the Florida banking industry will certainly continue to concentrate on geographic diversification.

For the 1980 legislative session, the spotlight will be focused on the enactment of a new Banking Code to supersede the present version, which will be automatically repealed in July 1980.¹⁴

II. USURY LAWS

A. Amendments

In response to industry complaints that interest rate ceilings were below prevailing money market rates, resulting in artificial allocations of credit and halting certain lending altogether, the 1979 Legislature enacted comprehensive amendments¹⁵ to the various state usury laws which generally increased interest rate ceilings.

Section 516.02 of the Florida Consumer Finance Act was amended to increase the maximum amount of interest which unlicensed lenders may charge on loans of up to \$2500 from 10% per annum to 18% per annum.¹⁶ Similarly, sections 516.18 and 516.21 were amended to increase to 18% the ceiling for consumer goods loans and surety and guaranty loans.¹⁷ Section 516.031 was

71 and accompanying text *infra*.

13. Miami News, May 21, 1979, at 10A, col. 2. The proposal has been dubbed "the Confederacy Amendment."

14. As of this writing, divergent versions of the new Banking Code have emerged in each house of the Florida Legislature. Without lengthy deliberation, the Senate passed a series of bills which together resemble the existing Code in that they treat each type of licensed financial institution separately. On the other hand, the House Committee on Commerce has endeavored to produce an omnibus bill to govern all licensed financial institutions. Both the Senate and House proposals are especially firm and precise in the area of sound banking practices. Also, it appears that the House, like the Senate, will probably impose further restrictions on the activities of foreign banks.

15. 1979 Fla. Laws ch. 79-274.

16. *Id.* § 1 (amending FLA. STAT. § 516.02 (1977)).

17. *Id.* §§ 3, 4 (amending FLA. STAT. §§ 516.18, .21 (1977)).

amended to increase from 16% per annum to 18% per annum the rate which may be charged by a licensed consumer finance company on that part of any loan exceeding \$1000 which is secured by land.¹⁸

The Motor Vehicle Sales Finance Act was amended to increase the permissible finance charge on retail installment sales of new motor vehicles from \$8 per \$100 per year to \$10 per \$100 per year. The new rate is the add-on equivalent of approximately 18% per annum simple interest.¹⁹ In the case of sales under the Retail Installment Sales Act, the amendments increase the permitted finance charge from \$10 per \$100 per year to \$12 per \$100 per year, or approximately 21.5% per annum simple interest.²⁰ This increase will presumably facilitate the sale of retail installment contracts to finance companies.²¹

The amendments have substantially changed the usury provisions governing industrial savings banks. Previously, these banks could charge a discount of not more than 8% per annum upon the total amount of a loan less than thirty-six months in duration, plus an additional charge of not more than 2% of the principal amount for investigative and other loan origination costs.²² In the case of loans exceeding thirty-six months, the discount, exclusive of additional charges, could not exceed the equivalent of 18% per annum simple interest.²³ The 1979 amendments, however, have deleted the 8% maximum discount provision and created a maximum rate, regardless of the duration of the loan, of "the equivalent of 18 percent per annum simple interest."²⁴

Additionally, the 2% charge for costs have been limited by the amendments to a maximum of \$50 and expressly apply the new rate ceilings to unsecured as well as secured loans.²⁵ The maximum rate of interest on loans made by a credit union was also increased

18. *Id.* § 2 (amending FLA. STAT. § 516.031 (1977)).

19. *Id.* § 5 (amending FLA. STAT. § 520.08(1)(a) (1977)); see STAFF OF FLORIDA HOUSE COMM. ON COMMERCE, SUMMARY AND ANALYSIS OF S.B. 1262 at 2 (June 4, 1979) (on file *University of Miami Law Review*) [hereinafter cited as SUMMARY S.B. 1262].

20. 1979 Fla. Laws ch. 79-274, § 6 (amending FLA. STAT. § 520.34 (1977)); see SUMMARY S.B. 1262, *supra* note 19, at 2.

21. See SUMMARY S.B. 1262, *supra* note 19, at 2.

22. FLA. STAT. § 656.17(1) (1977) (amended 1979).

23. *Id.* § 656.17(1) (Supp. 1978) (amended 1979).

24. 1979 Fla. Laws ch. 79-274, § 7 (amending FLA. STAT. § 656.17(1) (1977)). As in subsequent sections of the bill, the term "equivalent" was used so as to allow any method of computation, add-on or discount, as long as the result does not exceed 18% simple interest. See SUMMARY S.B. 1262, *supra* note 19, at 3.

25. 1979 Fla. Laws ch. 79-274, § 7 (amending FLA. STAT. § 656.17(1) (1977)).

from 1% a month to 1.5% a month on unpaid loan balances.²⁶

With respect to small loans by commercial banks, the amendments increased the allowable amount of such loans from \$15,000 to \$50,000 and deleted the 6% discount or add-on rate ceiling, substituting a ceiling of "the equivalent of 18 percent per annum simple interest."²⁷ The authorized 5% penalty has been extended to defaults in interest as well as principal payments.²⁸ Additional charges for investigative and other origination costs,²⁹ premiums for collateral preservation and credit life insurance,³⁰ and fees or taxes paid to public officials were also authorized.³¹

Finally, the general civil usury provisions were amended to increase the interest ceiling on loans of \$500,000 or less from 10% per annum to "the equivalent of 18% per annum simple interest."³² The interest ceiling on loans exceeding \$500,000 was increased from 15% per annum to 25% per annum simple interest, the limit established by the criminal usury statute.³³ The amendments have eliminated the distinction between loans to individuals and corporations.³⁴

As originally drafted, the amendments were limited to prospective application.³⁵ During the special session, however, the legislature extended the amendments to loans, advances of credit or lines of credit made prior to July 1, 1979, "if the lender has the legal right to require full payment or to adjust or modify the interest rate, by renewal, assumption, reaffirmation, contract, or otherwise."³⁶

In addition to increasing interest rate ceilings, the legislature exempted from the civil usury laws certain loans made to alien borrowers, where the loan is "clearly related to, and usual in, inter-

26. *Id.* § 8 (amending FLA. STAT. § 657.14 (1977)).

27. *Id.* § 9 (amending FLA. STAT. § 659.18(1) (1977)).

28. *Id.* (amending FLA. STAT. § 659.18(2)(a) (1977)).

29. *Id.* (amending FLA. STAT. § 659.18(2)(c) (1977)). These charges may not exceed the lesser of \$50 or two percent of the principal amount of the loan.

30. *Id.* (amending FLA. STAT. § 659.18(2)(b), (d) (1977)).

31. *Id.* (adding FLA. STAT. § 659.18(2)(e) (1977)).

32. *Id.* §§ 12, 13 (amending FLA. STAT. §§ 687.02, .03(1) (1977 & Supp. 1978)).

33. FLA. STAT. § 687.071(2) (1979).

34. 1979 Fla. Laws ch. 79-274, §§ 12, 13 (amending FLA. STAT. §§ 687.02, .03(1) (1977 & Supp. 1978)).

35. *Id.* § 15.

36. 1979 Fla. Laws ch. 79-592, § 1 (amending 1979 Fla. Laws ch. 79-275, § 15). In other words, credit arrangements entered prior to the amendments that could be subject to some form of modification by the parties may now be renegotiated at higher effective interest rates.

national or foreign business."³⁷ The exemption does not, however, extend to the criminal usury laws, which thus continue to provide a 25% per annum ceiling on such transactions.³⁸ This exemption, like the exemption of similar transactions from documentary stamp taxes,³⁹ is intended to remove former impediments to the growth of international financing transactions in Florida. The exemptions should accord Florida lenders competitive equality with lenders in other jurisdictions, to which such transactions are presently diverted in an effort to avoid Florida usury laws.⁴⁰

The 1979 amendments provide a "good faith" defense for lenders that discover a usurious overcharge and rectify it.⁴¹ Prior usury law penalties, provided for forfeiture of all interest charged, not merely the usurious portion. This penalty applied even if the lender, prior to the borrower's suit or defense under the statute, sought to rebate the usurious overcharge and retroactively adjust the interest on the obligation. Thus, it was theoretically more advantageous for the lender to remain silent rather than alert the borrower, hoping that the usurious overcharge would never be discovered.⁴² Under new subsection 687.04(2), however, the penalty does not apply to a lender that notifies its borrower of a usurious overcharge and refunds the amount of such overcharge plus interest thereon at the maximum lawful rate.⁴³ The lender must do so, however, prior to the filing of an action or defense by the borrower charging usury, or receipt by the lender of written notice from the borrower that usury has been charged or collected.⁴⁴

B. Federal Legislation

In response to the unavailability of credit due to the cost of

37. 1979 Fla. Laws ch. 79-138, § 1 (codified at FLA. STAT. § 687.13 (1979)). The exemption applies to loans made by any international bank agency or any bank, including an Edge Act corporation, organized under federal or Florida law.

38. *Id.* See FLA. STAT. § 687.071 (1979); STAFF OF FLORIDA HOUSE COMM. ON COMMERCE, SUMMARY AND ANALYSIS OF H.B. 1698 at 1 (June 5, 1979) (on file *University of Miami Law Review*).

39. FLA. STAT. § 201.23(1)(a), (b) (1979).

40. Baena & Romanchuck, *Banking Law, 1977 Developments in Florida Law*, 32 U. MIAMI L. REV. 763, 769 (1978).

41. STAFF OF FLORIDA HOUSE COMM. ON COMMERCE, SUMMARY AND ANALYSIS OF H.B. 1496 at 3 (May 23, 1979) (on file *University of Miami Law Review*). This staff summary suggests that the new subsection closely parallels a provision of the Federal Truth in Lending Act, 15 U.S.C. § 1640(b) (1976).

42. *Id.*

43. 1979 Fla. Laws ch. 79-90, § 1 (amending FLA. STAT. § 687.04 (1977)).

44. *Id.*

money soaring beyond state interest rate ceilings, Congress enacted the Consumer Services and Usury Act,⁴⁵ which imposed a moratorium on the application of such laws to any loan secured by a first lien on residential real property. The moratorium applied to loans made in any state until March 31, 1980, unless prior to that time the state reinstated limitations on interest chargeable on such loans.⁴⁶ Residential mortgage loans, or commitments to lend, made prior to the expiration date of the Act continue to be subject to the Act after expiration and are beyond the reach of state usury laws.⁴⁷

The Act also amended the National Bank Act,⁴⁸ the Federal Deposit Insurance Act,⁴⁹ the National Housing Act⁵⁰ and the Small Business Investment Act of 1958⁵¹ to increase the interest chargeable on business and agricultural loans of \$25,000 or more. The amendments permit interest in the amount of 5% in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank, institution or small business investment company is located.⁵² These measures were to remain in effect until July 1, 1980, unless the state adopted a law or its voters endorsed a referendum stating in substance that the state preferred that the federal amendments not apply to loans made in the state.⁵³

C. Interest Rate Parity

The usefulness of the Florida Interest Rate Parity Law,⁵⁴ which equalizes interest rates chargeable by the various types of lending institutions, may have been limited by the 1979 usury law amendments, which have the same effect. Rather than repeal the parity statute, however, the legislature authorized an in depth

45. Pub. L. No. 96-161, § 105(a)(1), 93 Stat. 1233 (1979).

46. *Id.* § 105(b).

47. *Id.* § 105(d).

48. *Id.* § 201 (amending 12 U.S.C. § 85 (1976)).

49. *Id.* § 202 (amending 12 U.S.C. § 1831(a) (1976)).

50. *Id.* § 203 (amending 12 U.S.C. § 1730(e) (1976)).

51. *Id.* § 204 (amending 15 U.S.C. § 687(h) (1976)).

52. *Id.* §§ 201-205.

53. *Id.* § 207.

54. FLA. STAT. § 687.12(1) (1979) provides, *inter alia*, that any lender or creditor licensed or chartered under federal law or selected provisions of Florida law may extend credit "at the maximum rate of interest permitted by law to be charged on similar loans or extensions of credit made by any lender or creditor in the State of Florida," except that the maximum interest ceilings for all loans, as well as other statutes governing the amount, term, permissible charges, rebate requirements, and restrictions for similar loans, remain applicable to the transaction.

study of its operation and effect by the Department of Banking and Finance, which was required to report its findings by March 1, 1980.⁵⁵

As long as the parity statute remains in force, however, it is arguable that state and national banks in Florida may make the same type of mortgage loans as savings and loan associations and be eligible for the usury law exemption now enjoyed by those associations,⁵⁶ provided that the bank loans comply with the restrictions of the Savings Association Act.⁵⁷ But this argument remains academic as long as the federal moratorium on the application of state usury laws to residential mortgage loans is effective.⁵⁸

D. *Spreading Statute*

In *Hamm v. St. Petersburg Bank & Trust Co.*,⁵⁹ the District Court of Appeals, Second District, construed the language of the "spreading" statute,⁶⁰ which provides that in computing the effec-

55. 1979 Fla. Laws ch. 79-274, § 16.

56. FLA. STAT. § 665.395 (1979) provides:

No fines, interest or premiums paid on loans made by any building and loan association shall be deemed usurious, and the same may be collected as debts of like amount are now collected by law in this state, and according to the terms and stipulations of the agreement between the association and the borrower.

The Supreme Court of Florida recently concluded that state and federal savings and loan associations were exempt from the usury laws under this provision. See *Catogas v. Southern Fed. Sav. & Loan Ass'n*, 369 So. 2d 922 (Fla. 1979). See also *Florida Bankers Ass'n*, Legal Bull. No. 79-1 (Mar. 5, 1979) (on file *University of Miami Law Review*). Bank enjoyment of this usury exemption through the parity statute, however, would conflict with that statute's subordination to maximum interest rate ceilings. See FLA. STAT. § 687.12(1) (1979).

57. FLA. STAT. §§ 665.011-717 (1979).

58. See note 45 and accompanying text *supra*.

59. 379 So. 2d 1300 (Fla. 2d DCA 1980).

60. FLA. STAT. § 687.03(3) (1979) provides, *inter alia*:

For the purpose of this chapter, the rate of interest on any loan of money shall be determined and computed upon the assumption that the debt will be paid according to the agreed terms, whether or not said loan is paid or collected by court action prior to the term of said loan, and any payment or property charged, reserved, or taken as an advance or forbearance, which is in the nature of, and taken into account in the calculation of, interest shall be valued as of the date received and shall be spread over the stated term of the loan for the purpose of determining the rate of interest. The spreading of any such advance or forbearance for the purpose of computing the rate of interest shall be calculated by first computing the advance or forbearance as a percentage of the total stated amount of the loan. This percentage shall then be divided by the number of years, and fractions thereof of the loan according to its stated maturity date, without regard to early maturity in the event of default. The resulting annual percentage rate shall then be added to the stated annual percentage rate of interest to produce the effective rate of interest for purposes of this chapter.

tive rate of interest under the usury laws, other charges in the nature of interest shall be spread over the stated term of the loan regardless of acceleration.⁶¹ The bank had loaned Hamm \$290,000 for two years at a stated annual interest rate of 9% on July 21, 1973,⁶² receiving at that time a 2% "commitment fee" of \$5800. When the bank sued to foreclose, Hamm asserted usury as a defense, arguing that the fee had reduced the actual principal sum received to \$284,200. The usury statute thus permitted the bank to charge a maximum of \$56,840 as interest, but Hamm was obligated to repay \$58,000 including the fee, in addition to the \$284,200 received.⁶³

The bank sought summary judgment, arguing that even if the fee were in the nature of interest, the total effective rate of interest as calculated under the spreading statute did not exceed the 10% ceiling. The bank first computed the fee (\$58,000) as a percentage of the total stated amount of the loan (\$290,000), yielding 2%, which was then divided by the term of the loan (two years) and added to the stated annual percentage rate of interest (9%), producing a total effective rate of interest of 10%.⁶⁴ The court held that summary judgment under the above rationale was improper, concluding that the spreading statute applied only in those cases in which the debt had been accelerated, and that in this case, the loan had not been accelerated. If in fact the fee were in the nature of interest, then Hamm was correct and the loan was usurious on its face at an effective interest rate of 10.204%. But the court also

61. 379 So. 2d at 1305.

62. The spreading statute, enacted in 1977, was found to apply retroactively to this 1973 loan, since usury statutes involve remedies and create no substantive rights. The court found that a prospective application clause in subsection 2(b) did not limit subsection 3. *Id.* at 1302.

63. The court held that "the ultimate test for usury is always whether the debtor is required to pay back an amount which exceeds what he actually received plus interest on that amount at the maximum annual rate computed over the length of loan." *Id.* at 1304. The maximum 10% interest rate applicable in the *Hamm* case was subsequently raised to "the equivalent of 18 percent per annum simple interest." 1979 Fla. Laws ch. 79-274, § 13 (amending FLA. STAT. § 687.03(1) (1977)).

The court noted that the advance retention of interest at the maximum rate was customarily not considered usurious in many jurisdictions in the case of short term notes less than one year in duration, even though the retention effectively reduced the amount actually received below the face amount of the note. 379 So. 2d at 1303-04; see Annot., 57 A.L.R.2d 630 (1958).

64. The bank's computation under FLA. STAT. § 687.03(3) (1979), using the face amount of the note for the total stated amount of the loan, was initially persuasive with the Second District, which affirmed the summary judgment for the bank. 1979 FLA. L. WEEKLY 1200 (2d DCA July 18, 1979), *rev'd per curiam*, 379 So. 2d 1300 (Fla. 2d DCA 1980).

noted that the spreading statute yielded identical results, because the "[s]tated amount of the *loan* should not be equated with 'face amount of the note,' but rather with 'actual principal sum received.'"⁶⁵ This reading of the statute clearly encroaches upon legislative prerogative, as the court sought to avoid the theoretically harsh result to debtors of applying the statute as written.

III. GEOGRAPHIC RESTRAINTS ON BANKING

A. *Statewide Bank Mergers*

Although statewide branching legislation was again foiled in Florida, a compromise bill was enacted in the 1979 special session which would permit any state bank to establish branches by merger with any other bank located in the state.⁶⁶ The only restriction imposed is that a bank incorporated for less than three years may not merge with a bank located in another county.⁶⁷ Under the new law, the acquiring bank may also, with the approval of the Department of Banking and Finance, establish two new branches per year in the county in which it created a branch by merger.⁶⁸

Opponents charge that the new law brings the state closer to full statewide branch banking,⁶⁹ but, the measure may have little real impact on the industry. Florida's experience under countywide branching has been that few holding companies have taken advantage of the 1977 legislation.⁷⁰ The reasons for their reluctance include the pricing problems of operating one bank in two markets, personnel displacement and the burden of Federal Reserve membership where one of the merging banks is a member bank and the other a nonmember.⁷¹ These deterrents would seem to be equally

65. 379 So. 2d at 1305 n.6 (emphasis in original). The court was persuaded to adopt this construction on rehearing by a hypothetical offered by Hamm in which half the face amount of the loan was retained by the lender as an additional interest charge without violating the spreading statute as interpreted by the bank. *Id.* at 1303. "[W]e do not believe that the legislature could have intended for its statute to be read in such a way as would permit the outcome portrayed in the hypothetical." *Id.* at 1304.

66. 1979 Fla. Laws ch. 79-590, § 1 (amending FLA. STAT. § 659.06(1)(a)1 (1979)). Such mergers require the approval of the Department of Banking and Finance upon a determination that the resulting bank will be of sound financial condition. *Id.*

67. *Id.*

68. *Id.* The Department is to prescribe conditions for the establishment of intracounty branches, including a showing by the bank that public convenience and necessity will be served thereby.

69. Miami News, May 31, 1979, at 11A, col. 1. Opponents of the measure fear that the escalation-of-statewide branch-banking may drive smalltown banks out of business.

70. FLA. STAT. § 659.06(1)(a)1 (1977) (amended 1979).

71. Parker, *Update on Florida Bank Branching*, 64 ECON. REV. (FED. RES. BANK OF

applicable to the statewide merger concept.

B. Loan Production Offices

"Loan production office" is a generic term generally used to describe a banking facility which acts as a liaison with the main banking house in the referral and servicing of loans.

Presently, Florida law would seem to proscribe the establishment of loan production offices in the state by foreign banks;⁷² however, there have been efforts to change that policy.⁷³ Those efforts have not as yet been successful, as bankers and legislators continue to equate loan production offices with interstate branching. Proponents argue that the concerns of smaller banks are groundless with respect to the entry of money center institutions into Florida through loan production offices, because there is little market overlap with such smaller banks. Loan production offices are primarily intended to service large business accounts and thus would probably compete only with the larger banks in the urban centers of the state.⁷⁴

The automatic response of bankers and legislators to loan production offices spread to the courts in *Independent Bankers Association of America v. Heimann*.⁷⁵ A bankers' group (IBAA) challenged an interpretive ruling which sanctioned the establishment of loan production offices by national banks. The challenged ruling,⁷⁶ promulgated by the defendant Comptroller of the Currency,

ATLANTA) 34 (1979).

The prospect for enactment of full statewide branching in the near future may also deter holding companies from utilizing the limited 1977 provisions. For a discussion of reluctance due to other factors, see Goeller, *Response to Countywide Branching: The New Chapter in Florida Banking*, 62 ECON. REV. (FED. RES. BANK OF ATLANTA) 144 (1977).

72. FLA. STAT. § 659.57 (1979). See generally Baena & Murray, *Banking Law, 1978 Developments in Florida Law*, 33 U. MIAMI L. REV. 757, 777-86 (1979).

73. Memorandum from Cyrus E. Hornsby, III to Banking Committee—Corporate, Banking and Business Section—The Florida Bar (Jan. 10, 1979) (on file *University of Miami Law Review*).

74. J. Guttentag, *Branch Banking, Interstate Branching, and Loan Production Offices: Analysis of the Issues*, 15-16 (May 1979) (occasional paper, ISBN 0-916770-10-9, Law and Economics Center, University of Miami School of Law).

75. No. 78-0811 (D.D.C. Mar. 29, 1979) (on file *University of Miami Law Review*).

76. Interpretive Ruling, 12 C.F.R. § 7.7380(b) (1979) provides:

Origination of loans by employees or agents of a national bank or of a subsidiary corporation at locations other than the main office or a branch office of the bank does not violate 12 U.S.C. 36 and 81: *Provided*, That the loans are approved and made at the main office or a branch office of the bank or at an office of the subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank.

permitted national banks to originate loans at locations other than main banking or branch offices, provided that the loans were "approved and made" at the main banking or branch office.⁷⁷ The IBAA contended that the ruling gave national banks a competitive advantage over state banks because it exempted loan production offices from compliance with state and federally imposed branching restrictions.⁷⁸

The court agreed, concluding that loan production offices are branches within the meaning of 12 U.S.C. § 36(f),⁷⁹ since they provide all essential services connected with obtaining loans except disbursement and approval, which is easily communicated by telephone from the main or branch banking office.⁸⁰ "Thus, a prospective loan applicant may go to [a loan production office], complete the necessary paperwork, and subsequently receive the loan proceeds through the mail without ever going to a main or a branch bank office."⁸¹ Accordingly, the court ordered the Comptroller to rescind the challenged ruling, declaring it "null and void."⁸²

IV. INTERNATIONAL BANKING

A. *Revisions to Section 659.67*

When Florida's International Banking Law⁸³ was first enacted, no distinction was drawn between international bank agencies and representative offices in requiring that the assets of the international banking corporation exceed its liabilities by at least twenty-five million dollars.⁸⁴ Indeed, the Department of Banking and Fi-

77. *Id.*

78. 12 U.S.C. § 36(c) (1976) provides, *inter alia*:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks . . . , and subject to the restrictions as to location imposed by the law of the State on State banks.

79. 12 U.S.C. § 36(f) (1976) defines the term "branch" to include "any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent."

80. No. 78-0811, slip op. at 4.

81. *Id.*

82. *Id.*

83. FLA. STAT. § 659.67 (1977) (amended 1979).

84. *Id.* § 659.67(5)(a)5.

nance indicated at that time that it would impose the minimum net worth requirements on applicants seeking to establish only a representative office.⁸⁵ On the other hand, substantial differences between the activities which may be conducted by agencies as opposed to representative offices⁸⁶ make such "equal treatment" illogical, a deterrent to the establishment of representative offices. Recognizing the harshness of the original statute, the Department sponsored and the Legislature enacted an amendment reducing the minimum net worth requirement for representative offices to ten million dollars.⁸⁷

In competition with the lure of the Federal International Banking Act of 1978,⁸⁸ the legislature further amended Florida's counterpart statute to permit an international bank agency to "make any loan or investment or exercise any power which it could make or exercise if it were operating in this state as a federal agency."⁸⁹ More significantly, the Comptroller of Florida amended the rules governing these activities of international banking corporations to create "competitive equality" with federally chartered institutions. Pursuant to the amendments, effective February 25, 1980, the operations of international banking agencies

may be conducted with the same rights and privileges as a state bank including, but not limited to, maintaining credit balances incidental to or arising out of the exercise of its banking powers, paying checks and lending money, except that it shall not exercise fiduciary powers or accept deposits from any person who is a citizen of or who resides, is domiciled, or maintains its principal place of business in, the United States.⁹⁰

As a consequence, international banking agencies may now accept deposits from non-United States sources and make any loan that a state bank can make. It appears that domestic banks either do not

85. See Baena & Romanchuck, *supra* note 40, at 769.

86. FLA. STAT. § 659.67(1)(c) (1979) defines an international bank agency as "the international banking corporation with respect to all business or activities conducted in this state or through an office located in this state." In contrast, a representative office acts "in a liaison capacity with existing and potential customers of such international banking corporation and to generate new loans and other activities for such international banking corporation which is operating *outside* of the state." *Id.* § 659.67(1)(d) (emphasis added). Subsection 11 is equally restrictive: "No representative office shall conduct banking business in this state." FLA. STAT. § 659.67(11) (1979).

87. 1979 Fla. Laws ch. 79-145, § 1 (amending FLA. STAT. § 659.67(5)(a)5 (1977)).

88. 12 U.S.C.A. §§ 3101-3108 (West Supp. 1979).

89. FLA. STAT. § 659.67(6)(f) (1979).

90. To appear as FLA. ADMIN. CODE § 3C-15.03(3)(a) (1980) (on file *University of Miami Law Review*).

perceive their loan market to be in jeopardy or welcome the competition; since the amendments did not generate any objections during the comment period.⁹¹

Further to dull any competitive edge federal agencies may have under the International Banking Act of 1978,⁹² the Florida Legislature elected the option under that statute of prohibiting the establishment within the state of an international banking agency as a "state branch" or a "federal branch."⁹³

B. *International Banking Act Rules*

The Federal Deposit Insurance Corporation has issued regulations and rules implementing the International Banking Act of 1978,⁹⁴ which provides that federal branches which receive deposits of \$100,000 or less must be insured unless the Comptroller of the Currency determines by order or regulation that the activities of the branch do not require insurance.⁹⁵ Under the new regulations, a state branch of a foreign bank may be exempted from the insurance requirement if its acceptance of initial deposits under \$100,000 is limited to deposits of commercial concerns organized outside the United States, deposits of governmental units and international organizations, and deposits evidenced by drafts and checks issued by the branch.⁹⁶ An exempted branch must, however, notify its depositors that their funds are not insured.⁹⁷

The FDIC has also announced that it will not insure deposits in any state or federal branch of a foreign bank unless every branch located in the same state also becomes an insured branch, but this rule will not apply to any branch which accepts only initial deposits in an amount of \$100,000 or more.⁹⁸

More importantly, the new regulations establish pervasive reporting requirements for foreign banks that operate insured state

91. Telephone conversation with William Limon, Staff Counsel, Department of Banking and Finance (Feb. 13, 1980).

92. 12 U.S.C.A. §§ 3101-3108 (West Supp. 1979).

93. FLA. STAT. § 659.67(6)(g) (1979); see 12 U.S.C.A. § 3103(a)(1)(A), (2)(A) (West Supp. 1979).

A "state branch" is a branch of a foreign bank established and operating under the laws of any state, while a "federal branch" is established and operates under § 3102 of the federal statute. 12 U.S.C.A. § 3101(6), (12) (West Supp. 1979).

94. 12 U.S.C.A. § 3101-3108 (West Supp. 1979).

95. *Id.* § 3104(a).

96. 44 Fed. Reg. 40,060, 40,061 (1979) (to be codified in 12 C.F.R. § 346.6).

97. *Id.* (to be codified at § 346.7).

98. *Id.* at 40,060 (to be codified at § 346.3).

or federal branches.⁹⁹ The bank must agree to provide the FDIC with information regarding activities of the bank and its affiliates which are carried on outside the United States, allow the FDIC to examine all offices of the bank and its affiliates within the United States and pledge assets to the FDIC which are worth at least 10% of the average of the insured branch's liabilities for the last thirty days of the calendar quarter.¹⁰⁰

V. AMENDMENTS TO REGULATION Q

Regulation Q¹⁰¹ prescribes the maximum rates of interest per annum payable by a member bank of the Federal Reserve System on time and savings deposits.¹⁰² In an effort to alleviate the growing disparity between these interest rates and money market rates, the Federal Reserve Board raised the ceiling on deposit interest to 5¼ % for commercial banks and to 5½ % for savings banks.¹⁰³

In addition, the early withdrawal provisions of regulation Q were amended so that the present penalty of three months interest and payment of interest on the funds withdrawn at the passbook rate will only apply to time deposits made before July 1, 1979. Thereafter, the minimum penalty will be loss of six months' interest on deposits maturing in more than one year, and loss of three months' interest on deposits maturing in one year or less.¹⁰⁴

An interpretation of regulation Q was also adopted permitting member banks to accept funds pooled by investors, thereby facilitating deposits by consortiums of larger sums at higher rates of interest.¹⁰⁵ In a related development, however, the Securities and Exchange Commission has stated that it "is unable to conclude that it will not recommend" enforcement action against banks which offer participation in large certificates of deposit without compliance with the Securities Act of 1933¹⁰⁶ registration requirements.¹⁰⁷

This problem may now be academic, however, since the Federal Reserve Board, the Comptroller of the Currency, and the Fed-

99. *Id.* at 40,062 (to be codified at § 346.17).

100. *Id.* (to be codified at § 346.19).

101. 12 C.F.R. §§ 217.0-7 (1979).

102. *Id.* § 217.7.

103. 44 Fed. Reg. 32,648 (1979) (amending 12 C.F.R. § 217.7(c) (1979)).

104. 44 Fed. Reg. 46,435 (1979) (amending 12 C.F.R. § 217.4(d) (1979)).

105. 44 Fed. Reg. 32,353 (1979) (to be codified in 12 C.F.R. § 217.155(b)).

106. 15 U.S.C. § 77a-77bbbb (1976).

107. 31 WASH. FIN. REP. (BNA) A-8 (Aug. 6, 1979). *But see* *Drovers Bank v. SFC Corp.*, 452 F. Supp. 580 (N.D. Ill. 1978).

eral Deposit Insurance Corporation have each approved¹⁰⁸ a "loop-hole" savings deposit plan.¹⁰⁹ This plan enables depositors with less than the \$10,000 minimum needed to purchase money market certificates to borrow the balance from the issuing bank at a rate of one percent in excess of the certificate rate.¹¹⁰ The only condition imposed is that a bank must disclose in its advertisements the fact that it is necessary to borrow funds to achieve a stated return.¹¹¹ The loophole plan has not been adopted by the Federal Home Loan Bank Board, which has criticized the plan as a "circumvention of rate control regulations" and, in at least one instance, has demanded that the practice be discontinued.¹¹²

The Federal Reserve Board also adopted several other house-cleaning amendments to regulation Q. One requires a bank to pay a time deposit before maturity without penalty if the depositor dies and a representative or other owner requests withdrawal.¹¹³ Another amendment extends this payment without penalty requirement to a depositor who is declared mentally incompetent.¹¹⁴ Previously, banks, at their discretion, could pay all or a portion of the time deposit before maturity, with or without penalty. That rule will continue with respect to time deposits issued before July 1, 1979.¹¹⁵

In the future, the attention of the industry will be on the proposed Depository Institutions Deregulation Act¹¹⁶ which would eventually abrogate regulation Q altogether. Under the proposal, beginning on January 1, 1982 and each succeeding January 1 through January 1, 1989, the maximum rate of interest on each category of deposits established under regulation Q would be increased by at least one-half of one percent.¹¹⁷ On January 1, 1990, all regulation Q authority would expire, although the Federal Re-

108. Approval did not come through traditional regulatory action, but was given in letters sent to Representative Benjamin Rosenthal (D-N.Y.), Chairman of the House Government Operations Monetary Affairs Subcommittee. 48 U.S.L.W. 2235 (Oct. 2, 1979).

109. See 37 WASH. FIN. REP. (BNA) A-6 (Sept. 24, 1979).

110. 48 U.S.L.W. at 2235.

111. [Current] FED. BANKING L. REP. (CCH) Report Letter No. 781, at 1 (Sept. 20, 1979).

112. Miami News, Sept. 21, 1979, at 8A, col. 1; cf. 37 WASH. FIN. REP. (BNA) A-6 (Sept. 24, 1979) (Federal Home Loan Bank of Cincinnati considers plan violative of bank regulations).

113. 44 Fed. Reg. 46,436 (1979) (amending 12 C.F.R. § 217.4(d) (1979)).

114. *Id.*

115. *Id.*

116. H.R. 4986, 96th Cong., 1st Sess. (1979); see SENATE REPORT, *supra* note 10.

117. H.R. 4986, 96th Cong., 1st Sess. § 107(b)(1) (1979).

serve would retain standby authority to reimpose rate controls.¹¹⁸

VI. OWNERSHIP OF STATE BANKS

A. Fingerprints

Revisions to the Florida Banking Code have strengthened the investigative capabilities of banking regulators. All organizers, proposed directors, and chief executive officers, and each person subscribing to five percent or more of the voting stock of a state bank for which a charter is sought, must submit a complete set of fingerprints to the Department of Banking and Finance.¹¹⁹ Proposed new owners or owners of the controlling stock in corporations seeking to acquire control of an existing bank or trust company must comply with this requirement as well.¹²⁰

B. Citizenship of Directors

The requirement that all directors of state banks be citizens of the United States during their term has been relaxed. The amendment provides that not less than a majority of the directors be citizens during their term of service.¹²¹ This revision represents a classic balancing of interests, weighing the concern over expansion of foreign banks into the United States market and the possibility of foreign domination against the desire in states such as Florida to boost a sagging economy with foreign funds. At present, Florida is cautiously encouraging foreign infusions.

VII. SHARE DRAFTS, AUTOMATIC TRANSFER ACCOUNTS AND REMOTE SERVICE UNITS

The Court of Appeals for the District of Columbia has concluded in *American Bankers Association v. Connell*¹²² that the various regulatory agencies have no authority to authorize automatic transfer accounts,¹²³ remote service units¹²⁴ or share drafts.¹²⁵ The

118. *Id.* § 107(b)(2).

119. 1979 Fla. Laws ch. 79-144, § 1 (amending FLA. STAT. § 659.02 (1979)).

120. *Id.* § 2 (amending FLA. STAT. § 659.14 (1979)).

121. *Id.* ch. 79-53 (amending FLA. STAT. § 659.11(2) (1979)).

122. 47 U.S.L.W. 2686 (D.C. Cir. Apr. 20, 1979), *vacating per curiam* 447 F. Supp. 296 (D.D.C.) and 463 F. Supp. 342 (D.D.C. 1978), *cert. denied*, 100 S. Ct. 240 (1979) (full memorandum opinion on file *University of Miami Law Review*).

123. Automatic transfer accounts, as authorized by the Board of Governors of the Federal Reserve System in 43 Fed. Reg. 20,001 (1978) (to be codified in 12 C.F.R. § 217.5(c)(2), (3)), permit withdrawals to be made automatically from a savings deposit through payment to the bank itself or through transfer of credit to a demand deposit. The court found the

effectiveness of the court's order vacating the challenged regulations was stayed until January 1, 1980, in the expectation that Congress would respond legislatively to the policy questions raised.¹²⁶ After considerable dickering, Congress finally enacted emergency legislation postponing the proscription of the court until March 31, 1980.¹²⁷ Permanent approval of these programs is incorporated in the Depository Institutions Deregulation Act,¹²⁸ which may eventually wind its way through Congress. As these programs have become well entrenched in the industry and have been instrumental in providing consumers with more competitive and efficient banking services, they should be continued.¹²⁹

On the state level, similar legislation proposed by the Department of Banking and Finance would amend section 665.341 of the Florida Statutes¹³⁰ to permit transfers, by a negotiable or transferable order, of money deposited in a state savings association, as

automatic transfer account to be an indirect device for the payment of interest on a demand deposit, as prohibited by 12 U.S.C. § 371a (1976). Similarly, the automatic fund transfer system authorized by the Federal Deposit Insurance Corporation in 43 Fed. Reg. 20,222 (1978) (to be codified in 12 C.F.R. § 329.5(c)(2)) was held to be in violation of 12 U.S.C. § 1828(g) (1976), which directs the Board of Directors of the FDIC to prohibit the payment of interest on demand deposits. The automatic fund transfer system also effectively violated 12 U.S.C. § 1832(a) (1976), as amended by Pub. L. No. 95-630, § 1301, 92 Stat. 3712 (1978), which provides that, except in seven New England states, withdrawals from savings accounts may not be made negotiable or transferable instruments for the purpose of making transfers to third parties. See 47 U.S.L.W. at 2686; memorandum opinion at 2 & n.1.

124. Remote service units had been established by savings and loan associations "pursuant to Federal Home Loan Bank Board regulations (12 C.F.R. § 545.4-2 (1978)) which permit the withdrawal of funds from an interest-bearing time deposit account by a device functionally equivalent to a check." Memorandum opinion at 2. The court found this procedure to be in violation of the prohibition against checking accounts in § 5(b)(1) of the Home Owners' Loan Act of 1933, 12 U.S.C. § 1464(b)(1) (1976). See 47 U.S.L.W. at 2686.

125. Share drafts, authorized by the National Credit Union Administration in 12 C.F.R. § 701.34 (1978), are used as a means of withdrawing savings from federal associations and credit unions by drafting upon the account. Until the affected account is drafted against, it continues to earn interest. The court found that the Federal Credit Union Act, 12 U.S.C. §§ 1751-1790 (1976), did not contain an express grant of power to offer share drafts, nor could such power be implied in view of the legislative history. See memorandum opinion at 2, n.2.

126. 47 U.S.L.W. at 2686.

127. Consumer Services and Usury Act, Pub. L. No. 96-161, § 105(b), 93 Stat. 1233 (1979).

128. H.R. 4986, 96th Cong., 1st Sess. (1979).

129. See Karr, *Share Drafts and the Draft Issue*, 12 U.C.C. L.J. 65 (1979).

130. FLA. STAT. § 665.341 (1979) limits the withdrawal of funds from savings associations, providing that a savings account member may file no more than one written application for withdrawal at a time. Savings associations may elect at any time to pay each and every such application in full as presented; otherwise, applications of \$200 must be paid in the order prescribed by a statutory rotation system.

well as amend chapter 657 to authorize credit union share drafts.¹³¹

VIII. CERTIFICATES OF DEPOSIT

The most significant but troublesome case of the year was *Citizens National Bank v. Bornstein*.¹³² In November 1973, Milford Mechanical Corporation ("Milford") purchased a \$13,000 certificate of deposit from Citizens National Bank of Orlando, now known as Pan American Bank of Orlando, N.A. ("Bank"). Previously indebted to the Bank for \$250,000, Milford executed a signature card containing a standard clause providing that the certificate could be set off by the Bank against any such indebtedness. The certificate stated on its face: "This certificate is assignable only with the consent of and on the books of the [Bank]."¹³³ The following language appeared on the reverse side: "ASSIGNMENT (Effective only when recorded on the books of the bank)."¹³⁴ In December 1973, Milford assigned the certificate to National Indemnity Company of Omaha ("National") as collateral for the purchase of a construction bond. National thereafter typed in a similar assignment form on the reverse of the certificate and assigned it to Barbara Bornstein as trustee of National.

No evidence was adduced that the Bank was notified of either assignment or that it had consented thereto. Indeed, in March 1974, the Bank paid interest on the certificate directly to Milford, which endorsed and deposited the interest check. Notice of the assignments first came on April 22, 1974, when the Bank received the certificate with a letter requesting payment to Bornstein. One week later, the Bank set off the funds represented by the certificate against Milford's \$250,000 debt and refused payment to Bornstein, who then brought suit.

The district court ruled for Bornstein, concluding that "the bank is not in a position as to the issued [*sic*] involved in this case to raise as a defense the defect in the manner in which the assignment was sought to be effected by Milford"¹³⁵ As for the

131. See Sadler & Walters, *Effects of Competition on Banking Law in the 1980's*, 54 FLA. B.J. 36 (1980). Share drafts were found to be a proper incidental power of Florida chartered credit unions in *Florida Bankers Ass'n v. Leon County Teachers Credit Union*, 359 So. 2d 886 (Fla. 1st DCA 1978).

132. 606 F.2d 114 (5th Cir. 1979).

133. 564 F.2d 721, 722 (5th Cir. 1977).

134. *Id.*

135. *Bornstein v. Citizens Nat'l Bank*, No. 74-202, slip op. at 6 (M.D. Fla. Mar. 12, 1975) (on file *University of Miami Law Review*).

lack of consent by the Bank, the court was persuaded by the fact "that the bank had never previously failed to consent to a requested assignment."¹³⁶ The district court denied the Bank's motion for new trial,¹³⁷ considering but not deciding whether the certificate was governed by the Florida Uniform Commercial Code,¹³⁸ under which the Bank argued it had a right of set-off. The Bank appealed to the United States Court of Appeals for the Fifth Circuit, which, in turn, certified a series of questions of Florida law to the Supreme Court of Florida.¹³⁹

The Supreme Court of Florida concluded that the transaction

136. *Id.*

137. *Id.* (June 9, 1975) (order denying Bank's motion for new trial).

138. FLA. STAT. §§ 671.101-680.111 (1979).

139. The Fifth Circuit certified the following questions to the Supreme Court of Florida:

I.

A. Is the assignment of the non-negotiable certificate of deposit as security for the purchase of a bond a transfer entitled to secured transaction treatment under Article 9 of the Florida Uniform Commercial Code, Fla.Stat. Ann. §§679.9-101 et seq. (West 1966), and, if so

B. Is the transfer excluded from coverage under Article 9 by the provisions of Fla.Stat. Ann. § 679.9-104(9) (West 1966) or Fla.Stat. Ann. § 679.9-104(11) (West 1966)?

II. If Article 9 of the Florida Uniform Commercial Code covers this transaction and the transfer is not excluded from the coverage:

A. Does Fla.Stat. Ann. § 679.9-318(4) (West 1966) invalidate the prohibition against assignment without the consent of the bank and the notation of the assignment on the books?

B. Is the Bank's asserted right of set-off established by Fla.Stat. Ann. § 679.9-318(1) (West 1966)?

III. If Article 9 of the Florida Uniform Commercial Code does not cover this transaction:

A. Is the prohibition against assignment without the consent of the Bank valid and enforceable against Bornstein, thereby rendering the assignments ineffective?

B. Is the "collateral transaction" rule of *Coffin v. Talbot*, 110 Fla. 131, 148 So. 184 (1933), and *Nusbaum v. Riskin*, 136 So.2d 1 (2d DCA Fla. 1961) still in effect? If the "collateral transaction" rule is still in effect:

1. Is the Bank's asserted right of set-off defeated by it? or

2. Is the "collateral transaction" rule avoided by the creation of a contractual right of set-off in the signature card which is not collateral to but, rather, part of the purchase and issuance of the certificate of deposit?

C. Is the Bank entitled to set-off the funds represented by the certificate of deposit if it has not changed its position in reliance on the deposit?

D. Is the Bank's asserted right to set-off defeated by its actual knowledge of the attempted assignment transaction prior to the time the set-off was consummated?

564 F.2d 721, 723 (5th Cir. 1977).

was entitled to article 9 treatment.¹⁴⁰ The court first characterized the certificate as an "instrument" as defined in section 679.105(1)(g) of the Florida Statutes¹⁴¹ because such deposit certificates evidenced a right to payment of money and were transferred in the ordinary course of business by delivery with any necessary endorsement or assignment. Although the written restrictions on assignability made the Bank's promise to pay conditional, rendering the certificate nonnegotiable,¹⁴² the court read the article 9 definition as encompassing nonnegotiable instruments.¹⁴³ Article 9 thus applied to the transaction because the assignment of the certificate, a nonnegotiable instrument, was intended as security for the bond purchase.¹⁴⁴

The court next concluded that the assignment did not fall within the exclusion from article 9 of transfers of "any deposit, savings, passbook or like account."¹⁴⁵ Also inapplicable was the similar exclusion of "any right of set-off,"¹⁴⁶ which the court interpreted to mean that the Bank, as claimant of a right to set-off, need not comply with article 9 perfection requirements in order to assert that right. "The section means simply that a right of set-off may exist in a creditor who does not have a security interest."¹⁴⁷

140. 374 So. 2d 6, 9 (Fla. 1979).

141. FLA. STAT. § 679.105(1)(g) (1977) (amended 1979) provides:

"Instrument" means a negotiable instrument (defined in s. 673.104), or a security (defined in s. 678.102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary endorsement or assignment.

142. 374 So. 2d at 13. The Bank argued that its conditional promise removed the certificate from the article 9 definition, relying on cases which dealt with the negotiability of instruments under § 673.104(1)(b).

143. 374 So. 2d at 9-10 (citing *First Nat'l Bank v. Lone Star Life Ins. Co.*, 524 S.W.2d 525 (Tex. Civ. App. 1975)).

144. FLA. STAT. § 679.102(1)(a) (1977) (amended 1979) provides that article 9 applies "[t]o any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, accounts or contract rights."

145. FLA. STAT. § 679.104(11) (1977) (amended 1979). The court referred to the 1972 revisions to the U.C.C., 374 So. 2d at 10, which were later adopted in Florida, effective January 1, 1980. Section 679.104 was amended by the addition of subsection 12, which excludes from article 9 coverage the transfer of any interest in a "deposit account." The term "deposit account" is defined in the amendments as a "demand, time, savings, passbook or like account maintained with a bank, savings and loan association, credit union, or like organization, *other than an account evidenced by a certificate of deposit.*" FLA. STAT. § 679.105(1)(e) (1979) (emphasis added). Thus, under the revisions, the court is clearly correct that the certificate did not fall within this exclusion from article 9.

146. FLA. STAT. § 679.104(9) (1979).

147. 374 So. 2d at 10. The court quoted Professor Gilmore's remarks on the purpose of

The Bank had argued that the certificate of deposit should be classified as a "general intangible" or a "contract right," which would in turn classify the Bank as an "account debtor."¹⁴⁸ Under section 679.318(1) of the Florida Statutes, Bornstein as assignee would thus take the certificate subject to the Bank's right of set-off, a claim or defense arising from the contract between account debtor and assignor.¹⁴⁹ Because the court had already classified the certificate as an "instrument" under the Code, it further concluded that the Bank was not an account debtor and was not entitled to preserve its set-off claim under that inapplicable section.¹⁵⁰ While that holding seems adverse to the Bank at first blush, the court further held that the certificate's printed prohibition against assignment without consent of the Bank was not invalidated by subsection 4 of the inapplicable account debtor statute.¹⁵¹

While adeptly handled, the court's analysis is not responsive to the inquiry. The court advised that account debtor provisions were inapplicable, that the set-off claim was not a security interest requiring article 9 perfection, and that the Bank was not necessarily precluded from asserting it against Bornstein.¹⁵² The court did not, however, indicate which of the conflicting claims would have priority, or whether article 9 would resolve the conflict at all.

this set-off exclusion from article 9:

This exclusion is an apt example of the absurdities which result when draftsmen attempt to appease critics by putting into a statute something that is not in any sense wicked but is hopelessly irrelevant. Of course a right of set-off is not a security interest and has never been confused with one. The statute might as appropriately exclude fan dancing.

G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 10.7, at 315-16 (1965), quoted in 374 So. 2d at 10 n.2.

148. 374 So. 2d at 10-11. FLA. STAT. § 679.105(1)(a) (1977) (amended 1979) defines "account debtor" as "the person who is obligated on an account, chattel paper, contract right or general intangible."

149. FLA. STAT. § 679.318(1) (1979) provides that unless the account debtor has agreed otherwise, the rights of an assignee are subject to "(a) [a]ll the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and (b) [a]ny other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment."

150. 374 So. 2d at 11.

151. *Id.* FLA. STAT. § 679.318(4) (1977) (amended 1979) provides: "[a] term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective."

152. 374 So. 2d at 10. While agreeing with the determination in *Lone Star* that the certificate was a nonnegotiable instrument, *see* note 143 *supra*, the Supreme Court of Florida rejected the Texas court's conclusion that no subsequent set-off claim by the issuing bank could impair a security interest in a certificate of deposit perfected by possession. The *Lone Star* certificate was classified a nonnegotiable instrument for lack of bearer or order language, not because its assignability was restricted, as in *Bornstein*. 524 S.W.2d at 534.

In anticipation of an adverse decision classifying the certificate as an instrument, the Bank formulated an appealing but unsuccessful counterargument.¹⁵³ If the certificate were a nonnegotiable instrument, then section 673.805 of the Florida Statutes¹⁵⁴ made it subject to all provisions of article 3 except those peculiar to a holder in due course. Thus the "simple contract" defenses provided by section 673.306 of the Florida Statutes¹⁵⁵ against one *not* a holder in due course should be available to the Bank. These defenses should be read as "incorporating" the account debtor defenses of section 679.318(1), including the Bank's set-off claim.

Upon close scrutiny, the court rejected the Bank's reliance on section 673.805 to bring the certificate of deposit within article 3, because that section referred "to a particular type of instrument which meets all requirements as to form of a negotiable instrument except that it is not payable to order or to bearer."¹⁵⁶ This certificate also lacked negotiable form because it did not contain an unconditional promise to pay a sum certain in money: "[h]ere, in the event of assignment, the promise to pay is conditioned upon consent of the Bank and reflection of the assignment on the books of the Bank."¹⁵⁷ Although adverse to the Bank's incorporation argument, this conclusion is tremendously significant because the court tacitly recognized the validity of the proscription against assignment provided on the certificate itself.

Because it concluded that article 9 covered the transaction, the court did not reach the certified question whether, under Florida case law, the prohibition on the certificate rendered the assignment to Bornstein ineffective.¹⁵⁸ But, as noted above, the court did not explicitly indicate which party would prevail under article 9, either.

With the foregoing answers in hand, the Fifth Circuit again considered the case and, to the surprise of many, affirmed per

153. 374 So. 2d at 11-12.

154. FLA. STAT. § 673.805 (1979) provides: "This chapter applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this chapter but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument."

155. FLA. STAT. § 673.306 (1979) provides that a person who does not have the rights of a holder in due course takes the instrument subject to "(1) [a]ll valid claims to it on the part of any person; and (2) [a]ll defenses of any party which would be available in an action on a simple contract."

156. 374 So. 2d at 12 (quoting U.C.C. § 3-805, Comment (1977 version)).

157. 374 So. 2d at 13; see note 142 and accompanying text *supra*.

158. See note 139 *supra*.

curiam¹⁵⁹ the district court judgment for Bornstein. Absent a written opinion, one can only speculate why the Fifth Circuit ruled as it did. Since the Supreme Court of Florida had advised that article 9 governed the priorities of the claimants to the certificate, the task of the Fifth Circuit was to align those priorities under the statute. While some courts have found the interest of a secured party to be superior to that of a set-off claimant, the evolving rule is that only a "valid prior claim" will defeat the right of set-off.¹⁶⁰ The Fifth Circuit was thus obligated to decide whether Bornstein's interest was valid and, in doing so, it would have to consider the Bank's proscription against assignment of the certificate. Either the Fifth Circuit failed to make these determinations or it misconstrued the supreme court's opinion, from which it is abundantly clear that the Bank's restriction against assignment was valid.

As a consequence of the *Bornstein* case the industry is in a quandary: are certificates of deposit which restrict assignment non-assignable? Until this issue is resolved by a written opinion, issuers of certificates of deposit would be well advised to take possession of certificates if they seek to secure obligations of their depositors therewith. This result, of course, converts the right of set-off into a security interest notwithstanding section 679.104(9) of the Florida Statutes¹⁶¹ and undermines the concept of set-off generally. For the prudent issuer, however, there does not appear to be any viable alternative.

IX. OTHER DEVELOPMENTS

A. Uniform Commercial Code Revisions

Article 9 of the Florida Uniform Commercial Code was amended in 1979, effective January 1, 1980.¹⁶² Although the amendments were largely nonsubstantive and merely clarified the former version, they do contain non-uniform revisions including new filing rules.¹⁶³

159. 606 F.2d 114 (5th Cir. 1979) (per curiam).

160. First Wis. Nat'l Bank v. Midland Nat'l Bank, 76 Wis. 662, 251 N.W.2d 829 (1977); see Annot., 8 A.L.R.3d 235 (1966).

161. See note 147 and accompanying text *supra*.

162. 1979 Fla. Laws ch. 79-398 (amending FLA. STAT. §§ 679.302, .401, .403, .407(1) and adding §§ 679.408, 680.108, .109 (1979)). The author of this survey co-authored the amendments as well as the corresponding sponsors' notes.

163. A complete analysis of the amendments is beyond the scope of this article. For an explanation of the amendments by the official sponsors of the legislation, see FLORIDA BAR CONTINUING LEGAL EDUCATION COMM., SECURED TRANSACTIONS UNDER FLORIDA'S UNIFORM

B. Preservation of Collateral

In a suit against the guarantor of an equipment purchase loan, the District Court of Appeal, Third District, held that the lender bank's failure to perfect a security interest granted by the defaulting borrower justified a release of the guarantor to the extent he was damaged.¹⁶⁴

The court concluded that "[i]t was incumbent upon the Bank to take all normal precautions to perfect all security interest [sic]."¹⁶⁵ It is arguable that the decision rested upon the fact that the lender had "assured the guarantor that it would cause the necessary Uniform Commercial Code documents to be filed"¹⁶⁶ . . . in order to perfect its security interest.¹⁶⁷

C. Anticipatory Breach of Mortgage

In a foreclosure suit by a purchase money third mortgagee, the Third District held that the mortgagor's statements that it did not intend to make required payments on two senior mortgages and that it was preparing to file bankruptcy proceedings constituted an anticipatory breach of the senior mortgages, permitting the third mortgagee to foreclose.¹⁶⁸ This decision gives lenders a high degree of protection, but it does so at the expense of the well-established rule that there may be no anticipatory breach of a strictly unilateral obligation merely to pay money in installments under a promissory note.¹⁶⁹

COMMERCIAL CODE INCLUDING THE RECENT REVISIONS EFFECTIVE JANUARY 1, 1980 app. A (1979). See also Murray, *Commercial Law, 1979 Developments in Florida Law*, 34 U. MIAMI L. REV. 499, 557-60 (1980).

164. *Baitcher v. National Indus. Bank*, 368 So. 2d 439 (Fla. 3d DCA 1979).

165. *Id.* at 440.

166. *Id.* at 439.

167. Although not discussed in the opinion, this result is consonant with FLA. STAT. § 673.606(1)(b) (1979), which provides that a holder discharges any party to a negotiable instrument to the extent that the holder "[u]njustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse."

168. *Poinciana Hotel, Inc. v. Kasden*, 370 So. 2d 399 (Fla. 3d DCA 1979). The foreclosure suit was filed on the last day of a 10-day grace period for payment under the senior mortgages, which were thus not technically in default. The purchase money mortgagee's interest would have been destroyed if the senior mortgages had been defaulted and accelerated, a fact the court considered heavily in countenancing the premature foreclosure filing. The court noted that under FLA. STAT. § 671.208 (1979), the mortgagee could exercise the acceleration clause if he believed in good faith that the prospect of payment was impaired, although this point was not raised at trial. 370 So. 2d at 401 n.8.

169. 370 So. 2d at 402 (Schwartz, J., dissenting).

D. *Letters of Credit*

In *Fidelity National Bank v. Dade County*,¹⁷⁰ the Third District affirmed the well-established principle that a beneficiary of a letter of credit must strictly comply with the terms of the credit before it may demand payment thereunder. The court rejected the beneficiary's argument that documents submitted to the issuer when taken together constituted the certification required under the credit. In addition, the court suggested that a letter of credit "amounts to an offer by the issuer to purchase certain documents. If those documents are not tendered, the offer is not accepted, and the issuer is not bound."¹⁷¹ In applying this offer-acceptance analysis to letters of credit, the court departs from the more traditional view that a letter of credit is a binding agreement between the issuer and the beneficiary.¹⁷² The distinction between an offer and an agreement in this context is not merely academic, since an offer typically may be withdrawn, but an irrevocable letter of credit is binding on the issuer as soon as the beneficiary is properly advised that the credit has been issued.¹⁷³

In a suit by the renter of a safe deposit box for loss of its contents, the District Court of Appeal, Fourth District, refused to enforce an exculpatory clause in the rental agreement whereby the bank attempted to disclaim its bailee relationship and any liability for loss.¹⁷⁴ The bank argued that the clause also exonerated it from losses resulting from unauthorized access to the box by the renter's ex-wife. The court held the disclaimer ineffective against the express access limitations in the agreement, noting that acceptance of this argument would render the agreement "entirely nugatory."¹⁷⁵

170. 371 So. 2d 545 (Fla. 3d DCA 1979).

171. *Id.* at 548.

172. See *Dynamics Corp. of America v. Citizens & S. Nat'l Bank*, 356 F. Supp. 991, 995 (N.D. Ga. 1973); FLA. STAT. § 675.109(1) (1979).

173. FLA. STAT. § 675.106 (1979).

174. *Sniffen v. Century Nat'l Bank*, 375 So. 2d 892 (Fla. 4th DCA 1979).

175. *Id.* at 894.